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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michael Gowe, State Bar No. 226989 California Department of Justice 1515 Clay Street, 20th Floor Oakland, CA 94612 TELEPHONE NO.: 510-622-2201 FAX NO. (Optional) 510-622-2121 E-MAIL ADDRESS (Optional): michael.gowe@doj.ca.gov ATTORNEY FOR (Name): Respondent New Motor Vehicle Board		FOR COURT USE ONLY <div style="border: 1px solid black; padding: 5px; text-align: center;">FILED ENDORSED SEP 24 2015 By <u>R. TORRES</u> Deputy Clerk</div>	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sacramento STREET ADDRESS: 720 9th Street MAILING ADDRESS: CITY AND ZIP CODE: Sacramento, CA 95814 BRANCH NAME: Gordon D. Schaber Sacramento County Courthouse			
PLAINTIFF/PETITIONER: Nissan North America, Inc. DEFENDANT/RESPONDENT: California New Motor Vehicle Board			
NOTICE OF ENTRY OF JUDGMENT OR ORDER (Check one): <input checked="" type="checkbox"/> UNLIMITED CASE (Amount demanded exceeded \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded was \$25,000 or less)		CASE NUMBER: 34-2014-80001963	


TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on (date): September 21, 2015
2. A copy of the judgment, decree, or order is attached to this notice.

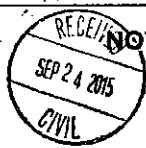
Date: September 23, 2015

Michael Gowe

(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)



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FILED/ENDORSED
SEP 21 2015
By: Melanie Greco
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

NISSAN NORTH AMERICA, INC.,

v.

CALIFORNIA NEW MOTOR VEHICLE
BOARD,

Respondent.

SANTA CRUZ NISSAN, INC.,

Real Party in Interest.

Case No. 34-2014-80001963
**PROPOSED JUDGMENT ON
PETITION FOR WRIT OF MANDATE**
CHRISTOPHER E. KRUEGER

On September 4, 2015, the Court heard this matter in Department 44, the Honorable Christopher Krueger presiding. Lisa M. Gibson and Maurice Sanchez appeared as attorneys for Petitioner Nissan North America, Inc. Michael Gowe, Deputy Attorney General, appeared as attorney for Respondent California New Motor Vehicle Board. Gavin M. Hughes appeared as attorney for Real Party in Interest Santa Cruz Nissan, Inc.

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1 The record of the administrative hearing having been received into evidence and examined
2 by the Court, arguments having been presented, and the Court having adopted its September 3,
3 2015 tentative ruling denying the petition for writ of mandate (see Exhibits 1 [tentative ruling]
4 and 2 [minute order]),

5 IT IS ORDERED and DECREED that:

- 6 1. The petition for writ of mandate is denied.
- 7 2. Respondent California New Motor Vehicle Board shall recover initial filing fees, the
8 payment of which is mandated by Government Code section 6103.5(a), in the amount of \$435,
9 which shall be paid by Petitioner to the California Department of Justice for subsequent
10 remittance to the Sacramento County Superior Court under Government Code section 6103.5(b).

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14 Dated: 9-21-15

CHRISTOPHER E. KRUEGER
JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME	September 4, 2015, 1:30 p.m.	DEPT. NO	44
JUDGE	HON. CHRISTOPHER KRUEGER	CLERK	M. GRECO
NISSAN NORTH AMERICA, INC. Petitioner, v. CALIFORNIA NEW MOTOR VEHICLE BOARD, Respondent.		Case No.: 34-2014-80001963	
SANTA CRUZ NISSAN, INC. Real Party in Interest.			
Nature of Proceedings:		PETITION FOR WRIT OF MANDATE	

Following is the court's tentative ruling denying the petition for writ of mandate.

INTRODUCTION

Petitioner Nissan North America, Inc. ("Nissan") challenges a decision by Respondent New Motor Vehicle Board ("Board") finding that good cause did not exist for terminating a franchise held by Real Party in Interest Santa Cruz Nissan ("SCN"). For the reasons stated below, the petition is denied.

UNDERLYING STATUTORY SCHEME

The franchise relationship between vehicle manufacturers and distributors (here, Nissan), and their dealers (here, SCN) is heavily regulated by statute. (Vehicle Code § 3000 et seq.;¹ *Tovas v. American Honda Motor Co.* (1997) 57 Cal.App.4th 506, 512.) The purpose of this statutory scheme "is to avoid undue control of the independent new motor vehicle dealer by the

¹ Further undesignated statutory references are to the Vehicle Code.

vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally.” (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A.* (2013) 221 Cal. App. 4th 867, 877 [internal quotes omitted].) In upholding California’s statutory scheme, the United States Supreme Court has recognized that it was enacted to address the “disparity in bargaining power between automobile manufacturers and their dealers” and “to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.” (*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 100–101.)

Of relevance to this case, the statutory scheme provides that “no franchisor shall terminate . . . any existing franchise” unless the Board finds “good cause” exists for the termination. (§ 3060, subd. (a)(2).) A franchisee who receives notice that its franchise is being terminated may file a “protest” with the Board. (§ 3060, subd. (a)(1).) If a protest is filed, an evidentiary hearing is held before either the Board or an administrative law judge (“ALJ”) designated by the Board. (§ 3066.) At the hearing, the franchisor has the burden of establishing that good cause exists to terminate the franchise. (§ 3066, subd. (b).) In determining whether good cause exists, the Board “shall take into consideration the existing circumstances, including, but not limited to, all of the following:”

- (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
- (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
- (c) Permanency of the investment.
- (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
- (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

- (g) Extent of franchisee's failure to comply with the terms of the franchise.

(§ 3061.) Following the hearing, the Board issues a written decision that "shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed . . . shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article" (§ 3067, subd. (a).) "Either party may seek judicial review of final decisions of the board." (§ 3068.)

FACTUAL AND PROCEDURAL BACKGROUND

Unless otherwise noted, the facts are taken from the challenged decision in this case.²

Nissan is the U.S. distributor for Nissan brand vehicles and parts. SCN is a Nissan dealership authorized to sell Nissan products pursuant to a written dealer agreement with Nissan. It is one of the oldest Nissan dealerships in the country and has been in business for over 40 years. It is located in Santa Cruz, California.

As relevant to this case, the dealer agreement between Nissan and SCN provides as follows:

Dealer shall actively and effectively promote . . . the sale at retail . . . of Nissan Vehicles to customers located within Dealer's Primary Market Area. Dealer's Primary Market Area is a geographic area which Seller [i.e., Nissan] uses as a tool to evaluate Dealer's performance of its sales obligations. Seller may, in its *reasonable* discretion, change Dealer's Primary Market Area from time to time. (Sec. 3(A) [emphasis added].)

The agreement further states:

Dealer's performance of its sales responsibilities for Nissan Cars and Nissan Trucks will be evaluated by Seller on the basis of such *reasonable* criteria as Seller may develop from time to time, including for example:

² The challenged decision in this case has three parts: (1) the ALJ's proposed decision; (2) the ALJ's proposed decision following the Board's order sustaining the protest and remanding the matter; and (3) the Board's decision adopting the proposed decision. All three documents are found in the Administrative Record ("AR") at pages 1144 through 1190. "Fact" refers to the numbered factual findings in the proposed decision.

- (1) Achievement of *reasonable* sales objectives which may be established from time to time by Seller for Dealer as standards of performance;
- (2) Dealer's sales of Nissan Cars and Nissan Trucks in Dealer's Primary Market Area . . . , or Dealer's sales as a percentage of: (i) registrations of Nissan Cars and Nissan Trucks; (ii) registrations of Competitive Vehicles; . . .
- (3) A comparison of Dealer's sales and/or registrations to sales and/or registrations of all other Authorized Nissan Dealers combined in Seller's Sales Region and District in which Dealer is located . . . ; and
- (4) A comparison of sales and/or registrations achieved by Dealer to the sales or registrations of Dealer's competitors. (Sec. 3(B) [emphasis added].)

The agreement also provides it may be terminated by Nissan if, based on Nissan's evaluation, "Dealer shall fail to substantially fulfill its responsibilities with respect to . . . [s]ales of new Nissan Vehicles" (Sec. 12(B).)

In March 2012, Nissan sent SCN a "notice of default" under the dealer agreement, citing "unsatisfactory sales penetration performance." The notice stated that in 2011 SCN's "RSE" was 51.6%, which ranked it 187th out of 194 Nissan dealers in the "West Region" and 95th out of 97 dealers in California. The notice advised that SCN had to achieve 100% of the West's regional average sales penetration with 180 days (later extended by an additional 60 days).

"RSE" stands for "regional sales effectiveness," and is the metric by which Nissan evaluates its dealers' sales effectiveness.³ Briefly (and vastly over-simplified), RSE is calculated as follows.⁴ First, the total sales of Nissan vehicles in a particular region is divided by the total number of "competitive set" vehicle registrations in that region. Competitive set vehicles are those brands and models of other manufacturers which Nissan has determined compete most closely with its models for customers.⁵ So, for example, if 100 Nissans were sold in a region that had 1000 competitive set vehicle registrations, Nissan's sales penetration in that region would be 10 percent. This percentage is then multiplied by the number of competitive set

³ It apparently changed the way it calculates that metric after the protest was filed. It does not argue that the change has any effect on the outcome of this case.

⁴ If the court has this wrong, or if it has simplified the calculation too much, the parties may so state at the hearing.

⁵ For example, presumably Nissan's Sentra does not compete with Lamborghini's Aventador, so Aventador sales would not be part of Nissan's competitive set.

registrations in each particular dealer's primary market area, which yields the number of expected sales for that particular dealer. Using the same example, if there were 210 competitive set registrations in a dealer's primary market area, that dealer would be expected to sell about 21 Nissans (i.e., 10 percent of 210). A dealer who meets this expectation is operating at 100% RSE – which means that dealer's sales are *exactly average* compared to the sales of all dealers. A dealer whose RSE is above or below 100% is selling, respectively, more or less Nissan vehicles than expected, and more or less vehicles than the *average* Nissan dealer sells.

SCN's RSE for 2005 through 2011 was as follows:

Year	RSE
2005	113.7%
2006	68.3%
2007	84.4%
2008	83.2%
2009	56.3%
2010	45.9%
2011	51.6%

Despite the notice of default, SCN did not achieve 100% RSE. Instead, its RSE actually declined slightly to under 50%. In January 2013, Nissan thus notified SCN that it intended to terminate the dealer agreement due to unsatisfactory sales penetration performance.

SCN filed a timely protest with the Board. A 12-day evidentiary hearing was held before an ALJ. Following the hearing, the ALJ issued a lengthy proposed decision. Although the ALJ acknowledged that SCN “did not capture sales opportunities available to it” (Fact 131) and that it “is a below-average performer” and “clearly lacks competitive ‘energy’” (Fact 189), it ultimately found that Nissan failed to establish good cause for terminating the franchise. In particular, and as noted in more detail below, the ALJ found that many aspects of Nissan's criteria for evaluating sales performance – particularly its use of averages – were not reasonable. The ALJ thus *sustained* SCN's protest.

After considering the proposed decision and the administrative record, the Board *conditionally sustained* the protest but remanded the matter to ALJ to recommend conditions to impose on SCN. Presumably, the Board wanted to impose conditions due to concerns about SCN's undisputed below-average performance.

The ALJ recommended various conditions, only one of which is seriously at issue here:

Effective immediately to December 31, 2015, the Board shall have exclusive jurisdiction to assess the sales performance of [SCN] and the following shall be the exclusive measurement of [SCN's] sales performance to December 31, 2015.

- (1) The assessment shall compare [SCN's] sales to the sales of the 10 dealers other than [SCN] in Nissan's District 8.
- (2) No less frequently than quarterly, Nissan shall calculate the average percentage increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8 other than [SCN] and transmit the calculations to [SCN].
- (3) The number of [SCN's] sales shall meet or exceed the average percentage increase in sales of the 10 dealers.
- (4) In any proceeding before the Board regarding [SCN's] sales performance using the foregoing standard, [SCN] will not challenge the reasonableness of the standard, nor shall [Nissan] be required to prove the reasonableness of the standard.

The court refers to this as the "sales performance" condition.

The Board thereafter adopted both the ALJ's proposed decision *and* the recommended conditions.

Nissan now challenges the Board's decision.

ANALYSIS

Nissan challenges the Board's decision on four separate grounds. It argues: (1) the decision is based on an unlawful underground regulation; (2) it was denied a fair trial because the ALJ improperly excluded certain evidence; (3) the findings are not supported by the evidence; and (4) the Board lacks authority to impose the sales performance condition.

1. The Board Has Not Adopted An Underground Regulation

Nissan's first argument is that the Board has *sub silentio* adopted a policy of not allowing a vehicle manufacturer and distributor to terminate a dealer for poor sales performance alone, and that the Board applied that policy in this case. Nissan claims this policy constitutes an "underground regulation" – i.e., a regulation that was adopted without complying with the

requirements of the Administrative Procedures Act ("APA").⁶ (Gov. Code § 11340 et seq.) The APA defines the term "regulation" very broadly to include "every rule, regulation, order, or standard of general application or amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" (Gov. Code § 11342, subd. (g).) One of the defining characteristics of a regulation is that the agency must intend the rule to apply generally to a large class of cases rather than to a specific case. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) Although the rule need not apply universally, it must declare how a particular class of cases will be decided. (*Id.*) So long as it meets this definition, an unwritten policy can be deemed a regulation subject to the APA. (*Bollay v. Office of Administrative Law* (2011) 193 Cal.App.4th 103, 109.) Whatever the merits of Nissan's argument in the abstract, it fails to convince that the Board has a generally applicable policy or rule that dealers may not be terminated based solely on poor performance.

Nissan's argument is based entirely on a few comments made during a public meeting held by the Board to consider the ALJ's recommended conditions. Four public members of the Board attended the meeting.⁷ In its opening brief, Nissan cites just *three* comments made during this meeting as evidence that the Board has adopted a rule that a dealer cannot be terminated for performance issues alone. All three comments were made by one Board member – Glenn Stevens.⁸ None of the comments – viewed either singly or in combination – establish the existence of Nissan's hypothesized policy.

First comment. Counsel for SCN (who obviously does not make policy for the Board) stated, "I don't think any dealer should be terminated for performance issues alone." Board member Stevens then stated: "It hasn't happened in the years I've been doing this."⁹ (AR

⁶ The APA, which is codified at Gov. Code § 11340 et seq., establishes procedures by which state agencies may adopt regulations. Among other things, the agency must give the public notice of the proposed regulation and an opportunity to comment thereon. (Gov. Code §§ 11346.4, 11346.5, 11346.8, 11346.9.)

⁷ The Board has nine members – four new motor vehicle dealers appointed by the Governor and five public members (i.e., not new motor vehicle dealers or their employees) appointed by the Senate, the Assembly and the Governor. (§ 3000, 3001.) For purposes of considering a petition involving a dispute between a franchisee and franchisor, three public members constitutes a quorum. (§ 3010.)

⁸ Although Stevens is apparently the longest serving member of the Board, it goes almost without saying that the views of one Board member do not establish Board policy.

⁹ Nissan consistently uses the word "never" in quotes when describing this particular comment by Stevens. (Opening at 7:21-24; Reply at 4:11-12.) At no time during the hearing does Stevens say the Board has "never" terminated a dealer for poor performance. In fact, Stevens never uses the word "never." Neither does Robin Parker,

7048.) This one sentence is scant evidence (if any) of the rule Nissan posits. The fact that the Board has not terminated a dealer solely for performance issues does not establish that it has a rule against doing so.

Second comment. Counsel for Nissan stated the Board “can’t have an absolute rule and bar that no dealer is ever going to be terminated for lack of sales. If that’s what this Board is saying, then that’s just wrong.”¹⁰ Board Member Stevens then said: “The dealers that have been terminated are usually that [i.e., not meeting sales goals] coupled with something else. For example, their doors are closed for seven days in a row. For example, they don’t keep their place in a clean manner; where they don’t stock adequate parts. They’re all symptomatic of the same problem.” (AR 7050.) In other words, dealers with poor sales performance “usually” have other problems as well. Again, however, Stevens’ comments do not establish that the Board has a rule against terminating dealers solely for performance issues.

Third comment. The following exchange occurred between Board members Brooks and Stevens:

BROOKS: At the end of the day if you can’t sell more Nissans, if you’re still at the bottom of the line, my policy question to the Board . . . is should we pull that product line or allow Nissan to do it?

STEVENS: *We can*, but it’s usually, like I said, it’s usually multiple good cause factors. That’s why there are multiple good cause factors.

(AR 7056 [emphasis added].) Far from proving Nissan’s hypothesized policy, Stevens’ comment actually tends to prove the opposite – that the Board has no such policy (“*We can*”

counsel for the Board, to whom Nissan also attributes use of the word “never.” (Opening at 7:24-27.) Other than counsel for the parties, the only Board member who actually uses the word “never” is Ryan Brooks, who states, “I’ve only been on the Board since April of six, seven years, and I’ve *never* seen a case where a product line has been terminated. That doesn’t mean that they shouldn’t be terminated.” (AR 7053 [emphasis added].) Although not entirely clear, Brooks appears to be saying that in the six or seven years he has served on the Board, he has never seen a franchise terminated, regardless of the reason. That no franchise has been terminated in seven years, however, does not establish that the Board has a policy of not allowing termination for poor performance alone. Even if Brooks’ comment is interpreted to mean he has never seen a franchise terminated for poor performance alone, however, and as with the similar comment by Stevens, this does not establish that the Board has a policy against allowing such terminations, particularly where Brooks immediately acknowledges “[t]hat doesn’t mean they shouldn’t be terminated.”

¹⁰ Nissan notes that no Board member spoke up in response to this comment from counsel and said “we don’t have such a rule,” and suggests this silence in the face of counsel’s comment is evidence such a rule exists. This silence could just as easily be seen as evidence no such rule exists – i.e., if someone says “you can’t have a rule that says X,” and you don’t have a rule that says X, why speak up and say anything?

terminate a dealer who can't sell more Nissans, but there are usually other factors as well). The Board's counsel reiterated this at another point during the meeting: "There's nothing that says you can't terminate for bad sales. It's just historically the Board hasn't." Board member Doi then added, "The manufacturers haven't asked for it."¹¹ (AR 7053.) In other words, historically the Board has not terminated dealers for poor sales alone, not because of a policy prohibiting such terminations, but because (1) the manufacturers have not tried to do so and (2) poor sales are usually coupled with other factors.

In its reply brief, Nissan cites two other comments by Stevens as evidence of a generally applicable Board policy. As a general rule, the court will not consider arguments raised or evidence cited for the first time in a reply brief, because "obvious considerations of fairness" demand that the moving party "present all of his points in the opening brief." (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)¹² Even if the court were to consider these two newly cited comments, however, they fail to establish that the Board has a policy of not terminating dealers based solely on poor performance.

The first comment by Stevens is, "We're trying to keep him [presumably SCN] in business *and get them* [presumably Nissan] *what they want at the same time and it may not be possible.*" (AR 7056 [emphasis added].) Nissan cites just the first part of the sentence but disingenuously tries to ignore the italicized portion. Again, far from proving Nissan's posited policy, this statement shows that even Stevens recognizes it "may not be possible" to keep a poor performing dealer in business if the manufacturer wants to terminate it.

Nissan also cites this comment by Stevens: "I don't like standards at all. That makes it impossible for a dealer to retain their franchise agreement if they don't meet certain sales standards. It really bothers me." (AR 7033.) That Stevens doesn't like sales standards, however, does not prove that the Board has a rule against terminating dealers based solely on poor performance.

¹¹ Nissan argues that counsel's comment is irrelevant because she is not a Board member. Counsel's comment may not be dispositive, but it provides some insight into the Board's historical decision making process. Moreover, Board member Doi immediately expanded on counsel's comment by noting that the Board has not historically terminated dealers for bad sales because "manufacturers haven't asked for it."

¹² The rule applies to *all* of the evidence that Nissan cited in its reply brief but not its opening brief.

2. Nissan Fails To Convince Any Evidentiary Rulings Were Improper Or Prejudicial

Nissan also complains about numerous rulings by the ALJ excluding certain evidence. Improper exclusion of admissible evidence can amount to an abuse of discretion and deprive a party of the right to a fair trial, but only if *prejudice* is shown (i.e., a “reasonably probab[ility] a result more favorable to the appellant would have been reached absent the error”). (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1538; see also *King v. Board of Medical Examiners* (1944) 65 Cal.App.2d 644, 649; *Carden v. Board of Registration for Professional Engineers* (1985) 174 Cal.App.3d 736, 744.)

Nissan states it was precluded “time and time again” from offering evidence about the three other brands (Volkswagen, Dodge, and Ram) sold by SCN. As evidence that the ALJ excluded such evidence “time and time again,” it cites *one ruling* by the ALJ excluding Exhibit 240 because it was too “attenuated.”¹³ (AR 6636.) The problem is that Nissan has not proffered Exhibit 240 to the court, or directed the court’s attention to where in the nearly 8000 page Administrative Record it may be found.¹⁴ The court thus cannot evaluate either the ALJ’s ruling or its potential prejudicial effect on Nissan’s case. The court notes that nothing prohibited Nissan from asking this court to review the excluded evidence. Indeed, such a request would have been perfectly proper (even advisable) because of the general rule that “[i]f it should appear from th[e] record that . . . the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial.” (*Ashdown v. State Department of Employment* (1955) 135 Cal.App.2d 291, 297; see also *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.) The court thus finds that Nissan fails to establish the ALJ’s decision to exclude Exhibit 240 was either erroneous or prejudicial.

¹³ It also cites two stipulated facts (“2AR, T73:897-899, Fact #3 and #5”) which establish only that SCN has been a Nissan dealer for 40 years and that it also sells Volkswagen, Dodge and Ram vehicles. (See Opening at 13:23-24.) Nissan fails to explain how these facts advance its argument regarding the improper exclusion of Exhibit 240.

¹⁴ The court notes for the record that it would not look favorably on an eleventh hour attempt at the hearing on the merits to provide this information. (See *In re Marriage of Stanton* (2010) 190 Cal.App.4th 547, 561 [where party’s brief lacks citation to authority, court may treat points as waived or meritless]; *Reichardt, supra*, 52 Cal.App.4th at 764 [court need not consider arguments or evidence cited for first time reply].)

Nissan then provides a “non-exhaustive but exemplary list” of other objectionable evidentiary rulings.¹⁵ Again, however, Nissan fails to explain *how* the challenged rulings had any effect on its case, much less a prejudicial effect. For example, James Courtright, SCN’s general manager, testified that it would be “very difficult to operate our dealership without Nissan,” and that it might not be “viable” to do so. (AR 6245-46.) He also testified, however, that “[i]f we don’t have Nissan, we’re not going to just quit. We’re going to try to make it.” (AR 6245.) Counsel for Nissan then asked, “couldn’t you sell more Volkswagen to try to make up some of the deficit? You would try to do that, correct?” Courtright answered, “We’re always trying to sell more product of any make.” Counsel for Nissan then asked the following question (which is the key question for purposes of Nissan’s argument): “I know you testify you’re always trying to do it. But would you specifically try to make more Volkswagen sales if you no longer had Nissan, correct?” Counsel for SCN objected: “I object to any question regarding Volkswagen sales. This is not a Volkswagen sales performance case.” The ALJ sustained the objection. (AR 6246-47.) Even if the court assumes the objection should not have been sustained, it is difficult to conceive of how *any* answer Courtright might have given could have reasonably effected the outcome of this case, particularly where, as here, Courtright immediately went on to testify that if SCN lost Nissan, it would do “whatever it took” to surviving, including “sell[ing] more vehicles,” which would include Volkswagens. (AR 6247.)

Nissan also complains the ALJ would not allow it to examine Courtright on whether statements he made in a letter to Volkswagen about the demographics of the Santa Cruz market being unfavorable to Volkswagen (this letter is Exhibit 240, discussed above) were inconsistent with his deposition testimony that other brands (including Volkswagen) outsell Nissan because of those same conditions. Again, Nissan does not point the court to the deposition testimony or the letter, so it is difficult to even analyze Nissan’s “prior inconsistent statement” argument. From reading the portion of the transcript that Nissan does cite, however, it does not appear that the ALJ actually excluded any evidence – she simply stated “Let’s move on. I think you’ve probably made the point you wanted to make, Mr. Sanchez. [Nissan’s counsel].” Sanchez then

¹⁵ The list, which is single-spaced, contains the entirety of Nissan’s argument regarding the challenged evidentiary rulings. Single-spacing of argument is impermissible. (Cal. Rule Court, Rule 2.108.) Presumably, Nissan utilized single-spacing in order to avoid the court’s 30-page limit on opening briefs. It is counseled to avoid such tactics in the future.

agreed he had made his point: “Well, *I did*, Your Honor.” (AR 6294 [emphasis added].) Nissan cannot now be heard to complain that Sanchez had not made his point, or that his inability to make his point (whatever it might be) was prejudicial.

Nissan also complains it was not allowed to ask Courtright whether he agreed or disagreed with a statement in a report prepared by SCN’s expert, Edward Stockton.¹⁶ Nissan’s counsel asked the ALJ if he could read “one paragraph” from “Mr. Stockton’s surrebuttal report,”¹⁷ and then ask Courtright “if he agrees with it or disagrees with it.” (AR 6297.) Counsel for SCN objected: “[H]e’s attempting to impeach our expert with the opinion of a lay person. We retained an expert to do this analysis and find an expert opinion. They’ve had an expert to challenge that expert opinion.” Counsel also noted “Both [parties’] experts have been on and off the stand, and both rebutted each other.” The ALJ sustained the objection. The court finds no prejudicial error, because there is no suggestion that Nissan was not allowed to rebut Stockton’s opinion with the opinion of its own expert, and no suggestion Nissan was not allowed to fully cross examine Stockton about his opinion. It is also difficult to understand how Courtright’s opinion of his expert’s opinion could have affected the outcome of this case.

Nissan also cites the fact that, at one point, the ALJ stated, “I’m going to call a halt to more questions about Volkswagen . . . otherwise we’ll get out into the weeds real quickly.” (AR 880.) Counsel for Nissan had just asked Stockton a question about a “regression display” included in his report: “What geographic area did you use in your regression to determine whether or not Volkswagen was favored?” (*Id.*) Again, Nissan fails to point the court to any evidence that would allow it to analyze either the relevance of the question Nissan wanted to ask or the propriety of the ALJ’s ruling.

Nissan also argues the ALJ improperly excluded evidence that Courtright had made prior inconsistent statements about Santa Cruz being a “pump-out” market in 2004,¹⁸ when SCN’s RSE was above average. Nissan’s two citations to the record, however, do not show *any* evidence was excluded. It cites pages 6270 and 1860 of the administrative record. (Opening at

¹⁶ In other words, Nissan’s counsel wanted to ask Courtright whether he agreed or disagreed with his own expert. The court notes that both sides had experts.

¹⁷ We are not told what information that one paragraph contained or pointed to where in the record it might be found.

¹⁸ In a pump-out market, a dealer sells cars to people who live outside that dealer’s primary market area (i.e., it pumps out sales to another market).

18:2.) On page 6270, a witness is asked about an article written in 2004. Although an objection is made (“asked and answered”), it is *overruled* (“Go ahead, Mr. Sanchez”). Page 1860 is one page from a 2007 letter from Nissan to SCN that appears to have nothing to do with pump outs.

Finally, Nissan also argues the ALJ improperly refused to admit into evidence a 2004 magazine article in *Ward's Auto* for which Courtright had been interviewed.¹⁹ The ALJ disallowed the article because “It’s too remote in time to be relevant to the proceeding.” (AR 6633.) The court agrees. The notice of termination was issued in 2013, and cited SCN’s sales from 2008 to 2012; the article was published in 2004.²⁰ Moreover, the ALJ did allow Courtright to testify about whether certain quotes in the article were accurate. (AR 6267.) The court thus finds no prejudice in disallowing an article that was written at least four years prior to any relevant time period.

3. Nissan Fails To Prove The Findings Are Not Supported By The Evidence

Nissan also argues the Board’s decision is not supported by the findings and the findings are not supported by the evidence. Because an automobile franchise is not a fundamental right, the court reviews the Board’s findings using the substantial evidence test. (Code Civ. Proc. § 1094.5, subd. (c); *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 632; *Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal.App.4th 200, 204-05.) Under the substantial evidence test, the court “may not reweigh the evidence, and is bound to consider the facts in the light most favorable to the administrative decision, giving that decision every reasonable inference and resolving all conflicts in the decision’s favor.” (*Amerco Real Estate Co. v. City of West Sacramento* (2014) 224 Cal.App.4th 778, 786; see also *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1077-78.) The court starts with the presumption the Board’s findings are supported by the evidence and Nissan bears the burden of demonstrating otherwise. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 456.) The court may reverse the Board only if, based on the evidence as a whole, a reasonable person could not have reached its decision. (*Donley, supra*, 180 Cal.App.4th at 456.)

¹⁹ Nissan apparently avoided the obvious hearsay problem by stating it wanted to use the article solely as evidence of a prior inconsistent statement made by Courtright. (Evid. Code § 1235.)

²⁰ We are not told when it was written, or when Courtright was interviewed. And, again, Nissan neither proffers the article nor points the court to where it can be found in the Administrative Record, which makes it next to impossible to intelligently analyze the merits of Nissan’s argument that it was improperly excluded.

The ALJ made over 150 separate findings of fact (Facts 41 through 200),²¹ all of which were adopted by the Board. Although Nissan argues the Board's findings are not supported by the evidence, with only a few exceptions it fails to identify which findings it challenges. Instead, it states that the Board's errors "are far too numerous to productively list in this brief," but that it would be happy to cite those errors "if the Court pleases." This is thoroughly unacceptable.²² Any finding which Nissan did not bother to specifically challenge is presumed to be true. (See *Von Durjais v. Board of Trustees* (1978) 83 Cal.App.3d 681, 687 [finding which is not specifically attacked is to be accepted as true]; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [reviewing court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record]; *Camarena v. State Personnel Board* (1997) 54 Cal.App.4th 698, 703 [failure to attack factual finding tantamount to concession it is true].)

In its opening brief, Nissan specifically identifies only ten findings to which it objects: Facts 187, 189, 120, 142A, 142B, 106-09, and 126.

Fact 187 is that "[b]etween 2009 and 2011, there were lost sales opportunities which Santa Cruz Nissan failed to capture." Fact 189 is that "Santa Cruz Nissan is a below-average performer. It clearly lacks competitive 'energy.' SCN's performance deficiencies are due to an insufficient level of resources to accomplish the task, no sense of urgency to change the situation, and no one in charge capable of executing plans for improvement." Nissan obviously agrees with both findings. Its real argument is that, given these findings, the Board could not *also* have found that SCN transacted a sufficient amount of business compared to the business available to it, or that it complied with the terms of its franchise (both of which are "good cause" factors enumerated in section 3061). Not so. Although the Board agreed SCN was a below-average performer, it also found that the way Nissan judged SCN's sales performance was both suspect and unreasonable in several respects (region too large to be useful; reliance on averages without further information has tendency to mislead; threatening termination if dealer does not achieve 100% RSE is "misusing" date; expanding SCN's primary marketing area to include Watsonville "for no discernible reason" which contributed to decline in RSE). (Facts 185-86.)

²¹ Facts 1 through 40 are essentially undisputed and/or procedural-type facts (for example, identifying the parties and counsel, identifying the witnesses, summarizing the parties' contentions, etc.).

²² Equally improper is Nissan's use of single-spacing to discuss the findings. (Cal. Rule Court, Rule 2.108.)

Fact 120 contains an explanation of how RSE is calculated and what “segment adjusting” consists of. Nissan argues the ALJ’s explanation contains “numerous errors,” but it fails to identify a single error.²³ The court thus treats the point “as waived, or meritless, and pass[es it] without further consideration.” (*In re Marriage of Stanton, supra*, 190 Cal.App.4th 547, 561; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [reviewing court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record].)

Nissan argues the following two findings are erroneous:

- “The net ‘out commute’ to San Jose-Silicon Valley of workers who live in SCN’s PMA takes them ‘over the hill’ into the PMAs of five other Nissan dealers. That some of these workers do buy near their work is shown by the cumulative ‘In-sell’ dot map at Exh 200H:4781.”²⁴ (142A.)
- “At year-end 2012, My Nissan [a Nissan dealer located in Salinas, approximately 25 miles from SCN] had 439 sales of Nissan vehicles; although most sales were concentrated around its dealership in Salinas, another concentration was in SCN’s PMA in Watsonville. (Exh 200H:4765).”²⁵ (142B.)

²³ It does cite a bar graph on page 2260 of the Administrative Record and points the court to “2AR, T78:806-812” for “accurate and jointly stipulated definitions of RSE and Segment Adjusting.” The court respectfully declines the implicit request to do Nissan’s work for it. If Nissan believes these documents show that Fact 120 is not supported by the evidence, it needs to explain why. For what it is worth, the court did review the stipulated definitions and found no obvious errors in the ALJ’s description of the relevant terms.

²⁴ Nissan’s criticism of this finding appears to be that although it acknowledges the relevant “in-sell” numbers (i.e., people who live in SCN’s primary market area, but who purchased their Nissan outside that area), it believes the map does not establish that the “in-sell” buyers purchased their vehicles near their workplaces. Nissan fails to explain why this criticism is relevant. Perhaps it believes it was actually SCN’s “lack of energy” that drove buyers to other dealers? Moreover, as the Board notes, the ALJ found that “More workers commute eastward ‘over the hill’ from Santa Cruz to jobs in Santa Clara County than westward into Santa Cruz County. The net commuter ‘outflow’ is approximately 1.5 persons for every 1 person coming into Santa Cruz,” (Fact 87), and Nissan does not challenge this finding. It is a reasonable inference that some of these Santa Cruz residents who commute over the hill to jobs in Santa Clara County also purchase vehicles close to their workplaces.

²⁵ Curiously, Nissan describes this particular finding as follows: “ALJ Hagle erroneously concluded that the 2012 RSE performance increase of another dealer, My Nissan, was correlated to and a ‘*mirror image*’ of the 2012 RSE decrease for SCN.” (Opening at 20:3-5 [emphasis added].) Again, although the phrase “mirror image” is in quotes, it does not appear in finding 142B. Perhaps Nissan meant to challenge a portion of finding 106 (that My Nissan’s RSE “soared” in 2012 and were “a mirror image of SCN’s decline”). But it did not do so. The court thus assumes this portion of finding 106 is accurate. Nissan *does* appear to challenge the following finding (which is also part of Fact 106): “The two closest dealers to Watsonville are My Nissan in Salinas and Gilroy Nissan in Gilroy.” Nissan states that, “in fact, SCN was the closest [dealer to Watsonville] by drive distance and drive time and equidistant with Gilroy in terms of air distance.” (Opening at 20:5-7.) Nissan cites *no* evidence to establish this “fact.” In any event, any discrepancy appears inconsequential. From eyeballing a map, it appears Watsonville is about equidistant

Again, Nissan fails to explain *how* or *why* these two findings are not supported by the evidence.

Finally, Nissan complains about the ALJ's citation (in a footnote) to an article about a corporate shakeup at Target that appeared in the Wall Street Journal in June 2014. (See Proposed Decision, p. 24, fn.19.) This citation was indeed odd. As Nissan notes, this article was not introduced into evidence and it is difficult to see how it could possibly be relevant to this case.²⁶ Nissan fails to explain, however, how the ALJ's citation to this article in a footnote demonstrates that the entire decision is "fatally flawed and unsupported."

4. Nissan Fails To Show That The Board Lacked Authority To Impose The Sales Performance Condition

Nissan's final argument is that the Board exceeded its authority by imposing the sales performance condition. It cites the rule (which no-one disputes) that "an administrative agency has only such power as has been conferred upon it by . . . statute and an act in excess of the power conferred upon the agency is void." (*BMW of North America, Inc. v. New Motor Vehicle Board* (1984) 162 Cal.App.3d 980, 994.) The Board has been expressly authorized to impose conditions when deciding a protest, and Nissan does not suggest otherwise. (§ 3067.) Nissan argues, however, that the sales performance condition in particular goes beyond the Board's statutory authority.

Again, that condition provides:

Effective immediately to December 31, 2015, the Board shall have exclusive jurisdiction to assess the sales performance of [SCN] and the following shall be the exclusive measurement of [SCN's] sales performance to December 31, 2015.

- (1) The assessment shall compare [SCN's] sales to the sales of the 10 dealers other than [SCN] in Nissan's District 8.²⁷

to Santa Cruz, Gilroy, and Salinas. Moreover, unless flying crows purchase cars, it is difficult to understand the relevance of Nissan's comment about "air distance" being equidistant.

²⁶ The article noted that Target's culture had shifted to one where store managers "had latitude to make their own calls on everything from product picks to special promotions," to one that focused on "rigid performance metrics." Presumably the ALJ's point was Nissan, like Target's corporate managers, was excessively focused on rigid performance metrics. Or, equally likely, and as SCN notes, the ALJ was simply attributing the phrase "rigid performance metrics" to the article in which he saw it.

²⁷ District 8 includes dealers located in Bakersfield, Selma, Fresno, Visalia, Salinas, Gilroy, San Luis Obispo, Santa Maria, Clovis, and Seaside. In other words, under the Board's conditions, SCN will be compared only to other dealers located in its immediate vicinity.

- (2) No less frequently than quarterly, Nissan shall calculate the average percentage increase (or decrease) in number of sales of new Nissan vehicles of the 10 dealers in District 8 other than [SCN] and transmit the calculation to [SCN].
- (3) The number of [SCN's] sales shall meet or exceed the average percentage increase in sales of the 10 dealers.
- (4) In any proceeding before the Board regarding [SCN's] sales performance using the foregoing standard, [SCN] will not challenge the reasonableness of the standard, nor shall [Nissan] be required to prove the reasonableness of the standard.

Nissan argues that the sales performance criteria imposed on SCN by the Board is not the sales performance criteria that it uses to evaluate its dealers. This is no doubt true. As the ALJ found, Nissan uses RSE to evaluate its dealers' sales performance.²⁸ (Fact 110.) The Board, however, has specified that (at least through the end of 2015), SCN will be evaluated using different criteria. Does it have the power to do so? Nissan fails to convince it does not.

Nissan's core argument is that the Board may not impose criteria that do not appear in the parties' agreement, but may only enforce the terms of that agreement. There is some intuitive appeal to this argument. Nissan, however, cites no authority for this argument, and the court is not convinced it is an accurate statement of the law. After all, in the words of one court, the Board has the "power to intrude upon the contractual rights and obligations of dealers [here, SCN] and their product suppliers [here, Nissan], entities whose respective economic interests are in no way identical or coextensive, frequently not even harmonious." (*Tovas, supra*, 57 Cal.App.4th at 512; see also *McKay v. Retail Auto. Salesmen's Local Union* (1940) 16 Cal.2d 311, 350 ["freedom of contract does not guarantee a citizen the right to contract without abridgement or interference by any legislative authority. Such right is subject to control and regulation under the police power"].)

The court agrees there does seem to be a limit on the type of conditions the Board is empowered to impose, because the relevant statute provides that "[c]onditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements

²⁸ The ALJ also found Nissan has a right to do so under the terms of its dealer agreement so long as it also complies with a different section of the agreement (Sec. 3(D).) that requires it to consider *other* "reasonable criteria" when evaluating sales performance. (Facts 111, 126.) Those other criteria include: dealership location; shopping habits of the public in the market area; any special local marketing conditions that would affect the dealer's sales; and any other factors that would affect the dealer's sales performance. (Sec. 3(D) of dealer agreement.)

between franchisees and franchisors or otherwise serving the purposes of this article” (§ 3067, subd. (a).) “This article” refers to Article 4, which deals with hearings on franchise termination. Thus, any condition imposed by the Board must either (1) be for the purpose of assuring performance of the dealer agreement between Nissan and SCN, or (2) otherwise serve the purpose of Article 4. The court finds this particular condition meets *both* requirements.

First, the dealer agreement in this case specifies that Nissan will evaluate sales performance “on the basis of such *reasonable criteria* as [Nissan] may develop from time to time.”²⁹ (Sec. 3.B [emphasis added].) Thus, any criteria developed and used by Nissan must be reasonable. The ALJ found (and the Board agreed) that RSE is not reasonable, at least as applied to the facts of this case. (See Facts 99-109 [facts relating to Nissan’s expansion of SCN’s primary market area shortly after serving notice of default to include Watsonville, including ultimate findings that this expansion (1) “was not an exercise of the ‘reasonable discretion’ contemplated by Sections 1.N. and 3.A. of the Dealer Agreement,” (2) “negatively affected SCN’s ‘sales performance’ score and ranking,” and (3) rendered the RSE calculations “not reliable.”]; Fact 120C [size of primary market area affects dealer’s sales effectiveness ratings]; Facts 114-115 [prior to August 2013, Nissan used regions that were “too large” to serve as appropriate benchmarks and that could lead to “inaccurate or misleading” results]; Fact 135 [sales criteria like RSE which are based on “averages” can be “misleading” because at any given time, about half of all dealers will be above average and about half will be below. “If underperforming dealers do become more successful, this will raise the average line, but there will still always be the roughly 50%-50% split of numbers above and below the average line. So even successful dealers could (inappropriately) be characterized as ‘underperformers’ if they fall below the average line.” “When Nissan requires an ‘underperforming’ dealer to ‘achieve 100% RSE’, and the dealer does so, all that happens is that another dealer will fall below the average line (and the rankings will change). By using ‘averages’, there will always be around 50% ‘underperforming’ dealers. Nissan’s use of ‘100% RSE’ as a performance goal . . . is not reasonable.”].)

²⁹ Although the agreement then goes on to list examples of such “reasonable criteria” as may be developed from time to time, the list is not exclusive (“including for example”): (Sec. 3.B.; see also, e.g., *Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1227028 [word “including” is word of enlargement not limitation].)

Nissan does not suggest that the Board lacks the power to decide (as it did in this case) that Nissan's actual performance criteria are *unreasonable*. Indeed, because the Board is specifically required to consider the terms of the dealer agreement in determining whether good cause exists for terminating that agreement, and because the dealer agreement in this case requires that performance criteria be "reasonable," it follows that the Board has the power to determine whether the particular criteria used by Nissan are reasonable. And having found that Nissan's actual criteria are unreasonable, there would appear to be no obvious prohibition against the Board imposing different, and reasonable, criteria in order to assure that SCN fulfills its obligation under the dealer agreement to "actively and effectively promote" sales of Nissan vehicles. (Sec. 3(A).) In other words, the sales performance condition is "for the purpose of assuring performance" by SCN of its contractual obligations. (§ 3067.) Nissan thus fails to convince that the Board lacks the power to temporarily impose performance criteria on SCN that are different than the criteria used by Nissan.

Second, the performance criteria condition imposed by the Board also serves the purposes of Article 4, which provides, in relevant part, that a distributor like Nissan cannot terminate a dealer like SCN unless the Board finds "good cause," and which provides a non-exclusive list of things for the Board to consider in determining whether good cause exists, including "existing circumstances." (§§ 3060, 3061.) The Board argues that one of the things it may consider when making the "good cause" determination is the Legislature's findings and declarations upon enacting the statutory scheme in the first instance: "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the *general economy* of the state and the *public welfare* and that in order to promote the public welfare . . . it is necessary to regulate . . . vehicle dealers, manufacturers, [and] distributors . . . in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor" (Quoted in *Tovas, supra*, 57 Cal.App.4th at 512, fn. 7 [emphasis added].) The Board argues it may thus impose *any* condition that would benefit either the public welfare or the general economy. The court is not convinced that the Board may impose *any* condition so long as it has some relationship to the public welfare or the general economy, but it need not decide the precise parameters of the Board's authority – only whether it exceeded those parameters here. Under Article 4, the Board is expressly empowered to

determine whether “good cause” exists to terminate a franchise, and also expressly empowered (indeed, required) to consider “existing circumstances” when making that determination. The court sees no reason why, for example, the Legislature’s desire “to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor” is not one of the existing circumstances that the Board may properly consider when determining whether good cause exists to terminate a franchise *and* in imposing conditions if it chooses to do so. The sales performance condition furthers this legislative purpose (i.e., it avoids undue control of SCN by Nissan).

Nissan disagrees, arguing the Board is only empowered to impose conditions that serve the purpose of Article 4, and noting the Legislature’s findings and declarations are not part of Article 4. This may technically be true – but the Legislature made its findings and declarations as part of the bill that added Article 4. Nissan’s reading of section 3061 (that it *only* permits the Board to enforce the terms of the existing dealership agreement) is too narrow.

Nissan also complains that the criteria developed by the Board suffers from a fatal flaw – it fails to adequately address the finding that led to the imposition of conditions in the first instance (i.e., that SCN is a below-average performer). This is partially true. The Board’s criteria merely require SCN to keep pace, on a percentage basis, with any sales increases by the other dealers in District 8. In other words, all SCN has to do to meet the Board’s criteria is match any sales increase by other dealers, or, as Nissan puts it, “float” up or down with the other dealers. But if all SCN does is match others’ increases (or float with the rising tide), it will still remain a below-average performer (because the average will rise). The Board never addresses this argument. In the abstract, it is quite persuasive. As noted above, however, the Board found that the use of averages to evaluate SCN’s performance in this case *is not reasonable* (Facts 120-21, 135), a finding which it is empowered to make. Thus, the fact that the Board’s performance criteria may not improve SCN’s sales relative to other Nissan dealers is not fatal.

In a related vein, Nissan also complains that the Board set conditions, and then failed to specify what will happen if the conditions are not met. This is also true. The decision simply provides that Nissan “may file a written request to the Board for an appropriate order if [SCN] fails to meet any of the foregoing conditions,” and that “[i]n any [future] proceeding where termination of [SCN’s] franchise may be ordered, [Nissan] shall have the burden of showing

'good cause' to terminate the franchise."³⁰ Presumably, Nissan would prefer it if the Board had stated "failure to meet any of the foregoing conditions will result in termination of SCN's franchise." But it cites no authority for the proposition that the Board must specify a penalty for failure to comply whenever it imposes conditions. Moreover, imposing a specific penalty for failure to comply would appear to conflict with the rule that it is Nissan's burden to establish good cause for terminating SCN's franchise. (§ 3066, subd. (b).) At least up to this point in time, the Board has found that Nissan *has failed to meet that burden*. It is not clear that SCN's failure to comply with any of the Board's conditions would automatically, and in all circumstances, sustain Nissan's burden of proof in this case. Presumably, however, if SCN fails to comply with the Board's conditions, Nissan's burden will be much easier to meet the second time around.

As for whether SCN will meet the Board's conditions, and what, if anything, the Board will do if it does not, Nissan will simply have to wait and see what actually happens.

CONCLUSION

For the reasons stated above, the petition for writ of mandate is denied.

The tentative ruling shall become the court's final ruling and statement of decision unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

The court prefers that any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court day before the hearing. (See Cal. Rule Court, Rule 3.670; Sac. County Superior Court Local Rule 2.04.)

In the event that a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m.

³⁰ This last sentence merely restates the law. (§ 3066, subd. (b) ["the franchisor shall have the burden of proof to establish that there is good cause to . . . terminate . . . a franchise"].)

on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.

EXHIBIT 2

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 09/04/2015

TIME: 01:30:00 PM

DEPT: 44

JUDICIAL OFFICER PRESIDING: Christopher Krueger

CLERK: M. Greco

REPORTER/ERM: Cynthia Hall CSR# 10064

BAILIFF/COURT ATTENDANT: B. McFarland

CASE NO: **34-2014-80001963-CU-WM-GDSCASE** INIT.DATE: 10/31/2014

CASE TITLE: **Nissan North America Inc vs. California New Motor Vehicle Board**

CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11932833,11932845

EVENT TYPE: Petition for Writ of Mandate - Writ of Mandate

MOVING PARTY: Nissan North America Inc

CAUSAL DOCUMENT/DATE FILED: Petition for Writ of Mandate, 10/31/2014

APPEARANCES

Michael Gowe, Dep: Attorney General for Respondent, C.N.M.V.B.

Lisa M. Gibson and Maurice Sanchez for Plaintiff, Nissan North America; Gavin M. Hughes for Santa Cruz Nissan, R.P.I.

NATURE OF PROCEEDINGS: HEARING ON WRIT OF MANDATE

The above entitled matter came before the court on this date for hearing on Petition for Writ of Mandate. The above named parties were present.

The Court issued a tentative ruling on September 3, 2115, that denied the petition.

Petitioner requested oral argument.

The Court heard oral argument, as fully stated on the record.

The Court adopted the tentative ruling without change and directed prevailing party, Respondent, to prepare and submit a judgment to the court for signature.
Court adjourned.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Nissan North America, Inc. v. California New Motor Vehicle Board**

No.: **Superior Court of California, County of Sacramento**
Case No. 34-2014-80001963

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On September 18, 2015, I served the attached **[PROPOSED] JUDGMENT ON PETITION FOR WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

Maurice Sanchez
Baker & Hostettler LLP - Costa Mesa
Lisa M. Gibson
600 Anton Boulevard, Suite 900
Costa Mesa, CA 92626
Attorney for Petitioner
Nissan North America, Inc.

Gavin M. Hughes
Michael J. Flanagan
Law Offices of Michael J. Flanagan
2277 Fair Oaks Blvd, Suite 450
Sacramento, CA 95825
Attorney for Real Party in Interest
Santa Cruz Nissan, Inc. dba Santa Cruz Nissan

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 18, 2015, at Oakland, California.

Denise A. Geare
Declarant

Denise A. Geare
Signature

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Nissan North America, Inc. v. California New Motor Vehicle Board**

No.: **Superior Court of California, County of Sacramento**
Case No. 34-2014-80001963

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On September 23, 2015, I served the attached **NOTICE OF ENTRY OF JUDGMENT OR ORDER** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

Maurice Sanchez
Baker & Hostetler LLP - Costa Mesa
Lisa M. Gibson
600 Anton Boulevard, Suite 900
Costa Mesa, CA 92626
Attorney for Petitioner
Nissan North America, Inc.

Gavin M. Hughes
Michael J. Flanagan
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2277 Fair Oaks Blvd, Suite 450
Sacramento, CA 95825
Attorney for Real Party in Interest
Santa Cruz Nissan, Inc. dba Santa Cruz
Nissan

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 23, 2015, at Oakland, California.

Denise A. Geare
Declarant


Signature